



Ombudsman Report

“Building Clarity”

**Investigation into how the Ministry of Government and
Consumer Services represents its relationship with
Tarion Warranty Corp. to the public**

**André Marin
Ombudsman of Ontario
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Overview

- 1** For most Ontarians, buying a new home is the single largest purchase they will ever make in their lives. It can be both an exciting and terrifying experience. In the case of the Smith family¹, their dream of home ownership quickly turned into a nightmare. The Smiths and their two young children eagerly moved into their new home, only to find that it was riddled with defects. They learned it had been struck by construction equipment eight times, the foundation was cracked, brickwork and stucco were defective, and beams and joists were improperly installed. The house leaked in several places, the family began to suffer health problems, and they had no kitchen cupboards for six months.
- 2** The Smiths turned to the Tarion Warranty Corporation for relief. Tarion is an independent, not-for-profit corporation that administers the Ontario New Home Warranty Plan. The plan offers protection to new home buyers, who pay an enrolment fee based on the purchase price of their house. The Smiths had paid \$750 for their coverage, and submitted claims to Tarion for over \$200,000, covering work they believed should have been completed before the purchase was finalized, as well as subsequent damages. Although they were provided with warranty coverage amounting to \$117,384, the Smiths were still left with 30 items to repair and insufficient funds to do so. The family was advised by Tarion to sign a release and then seek redress against the builder in civil court.
- 3** Dissatisfied with their experience with Tarion, the Smiths approached the Ministry of Government and Consumer Services to complain, only to learn from the Ministry two months later that it would be “inappropriate” for it to intervene. In the end, the Ministry did agree to relay information to Tarion regarding their concerns. However, this did not solve their problems.
- 4** Like the Smiths, other families we heard from sought the Ministry’s help after they experienced frustration in dealing with Tarion, only to be told that the Ministry could not assist with individual claims.
- 5** One can understand why desperate homeowners seek help from the Ministry. After all, “consumer services” is part of its name, and its website declares that:

Our goal at the Ministry ... is to promote a fair, safe and informed marketplace – one in which your rights as a consumer are fully protected.

¹ The Smiths and other homeowners referred to in this report and their experiences are real, but their names have been anonymized.

- 6 The Ministry does have an oversight role to play in new home ownership protection. But it is Tarion that is responsible under the *Ontario New Home Warranty Plan Act* for the administration of the warranty plan. Tarion is not government funded, but is financed exclusively through home enrolment fees, investment income and builder registration.
- 7 Every builder of a new home built for sale in Ontario is required to register with Tarion and to enroll every new home or condominium unit prior to construction. Tarion is governed by a 16-member Board of Directors. Under its bylaws, the Minister appoints five members to Tarion's board. The Ministry is not involved in the day-to-day functioning of Tarion, but has a more indirect monitoring role. The Act requires Tarion to submit an annual report to the Minister, and under an accountability arrangement it reports quarterly to the Ministry on operational data. The Ministry does not get involved in individual consumer complaints relating to Tarion's warranty decisions, which may be appealed to the Licence Appeal Tribunal. However, at times it will refer consumer concerns to Tarion to address.
- 8 The Ministry's role with respect to Tarion is not well publicized. Its website contains a link to Tarion's homepage, but little else concerning new home buyer protection. Consumers looking for information about the Ministry's relationship to Tarion are left to rely on their own intuition and whatever tidbits of other information they can find.
- 9 In the Legislative Assembly in May 2007, the Minister (then Gerry Phillips) stated that he is always looking at ways to improve Tarion. And last spring, the government announced it had appointed a new director to Tarion's board. In a June 9, 2007 *Toronto Star* article, this appointee was referred to as a "public advocate" and "consumer's representative." The Premier was quoted as saying: "We want to make sure that [there is] confidence in the warranty system that's in place, so we're increasing the public representation." The Minister was also quoted as remarking that the appointee, a retired journalist, could "speak pretty well for the consumer."
- 10 After this information was released, a number of concerned home buyers wrote directly to this latest "consumer representative" on the Tarion board. Tarion responded that in fact, this representative could *not* act as a special advocate or deal with consumer complaints, but rather was responsible for voicing consumer concerns in the context of his broader role as a director. In a letter to one disgruntled home owner, the Ministry explained:

The responsibility of the board member does not include involvement with specific homeowner decisions that are made by the corporation.

Accordingly, it is also inappropriate for board members to intervene in individual cases.

- 11** In 2007, there were 52,332 new homes enrolled in the warranty plan, with a total of 465,116 homes under warranty. The Corporation paid out over \$9 million in warranty claims. In the same year, 199 home owners complained to the Ministry about the Ontario New Home Warranty Plan and Tarion – all expecting the Ministry responsible for “consumer services” to help them. Considerable time was expended by Ministry officials in explaining the limited oversight role that the Ministry plays with respect to new home ownership. Much frustration and wasted effort could have been avoided if the Ministry had clearly and publicly set out its limited role with respect to matters concerning Tarion and the administration of the Ontario New Home Warranty Plan.
- 12** Considering the fact that hundreds of thousands of people rely on the warranty plan each year and that a new home purchase is a significant investment, I have concluded that the Ministry’s failure to clearly set out the nature of its role with respect to new home ownership needs to be remedied immediately. I am recommending that the Ministry clarify its role in this area, including with respect to publicly appointed members of the Tarion Board of Directors.

Investigative Process

- 13** My Office received more than 100 complaints over the past year from homeowners about their dealings with Tarion and the Ministry. These complaints came from individual homeowners, some Members of Provincial Parliament writing on behalf of constituents, and from a homeowner advocacy group.
- 14** Ombudsman staff began to monitor complaints relating to new home ownership after our Office received a detailed submission in March 2007 from the advocacy group, which called for the Ombudsman to be given oversight over Ontario’s new home warranty system and Tarion.
- 15** Although I have oversight over the Licence Appeal Tribunal, which handles appeals of decisions made by Tarion, I do not have jurisdiction over Tarion itself. As a result, my Office cannot investigate individual complaints from homeowners about Tarion. In 1986, in submissions to a Legislative Standing Committee, former Ombudsman Dr. Daniel Hill first suggested that this area be made part of the Ombudsman’s mandate, but for three decades it has remained outside the scope of the Ombudsman’s authority. One option recently contemplated by the Ministry as a way to enhance Tarion’s governance and accountability was to expand the

Ombudsman’s jurisdiction to include Tarion. However, the Ministry does not appear to be seriously considering this possibility at present.

- 16** The complaints were assessed by the Special Ombudsman Response Team (SORT). It became apparent that there was considerable confusion among consumers regarding the Ministry’s role with respect to new home warranty protection. Accordingly, I determined that it was appropriate to investigate how the Ministry represents its relationship with Tarion to the public. A notice of intent to investigate was issued to the Ministry on February 20, 2008.
- 17** A team of three SORT investigators and two Early Resolution Officers conducted the investigation. They interviewed Ministry staff involved in dealing with delegated authorities, as well as four of the appointees to the Tarion Board of Directors, and two of Tarion’s senior counsel. Investigators also reviewed the complaints we had received and conducted in-depth interviews with several homeowners.
- 18** The team reviewed binders of materials provided by the Ministry containing thousands of pages of documentation. This included a review of correspondence submitted by homeowners to the Ministry and the Ministry’s responses to homeowners dating back to 2005.
- 19** We also reviewed new home warranty programs in other provinces, to better understand what information is provided to consumers in those jurisdictions. Home warranty programs vary across the country, with only three provinces having mandatory new home warranty protection: Ontario, British Columbia and Quebec.
- 20** We received excellent co-operation from the Ministry throughout the investigation.

Ontario New Home Warranty Plan

- 21** Ontario first introduced a mandatory new home warranty plan in 1976. An independent non-profit corporation has always administered the plan. Its name has changed a few times over the years, but since 2004 it has been Tarion. On its website, Tarion states that its role is to ensure that builders comply with the legislation and to “step in to protect consumers when builders fail to fulfill their warranty obligations”.

- 22** Tarion’s total revenue in 2006 was \$70,645,000. A substantial portion of this – almost 47% – derives from home enrolment fees.² So, for every \$99 contributed by buyers through the home enrolment fee, builders paid roughly \$6 through registration and renewal fees. Available funds from the revenues collected from home enrolment and builder registration fees are invested. Investment revenue, which accounted for roughly 52% of Tarion’s total revenue in 2006, was used for various purposes such as settling warranty claims, providing for costs related to investigation, enforcement and other administrative costs associated with administering the legislation.
- 23** All new homeowners are provided with a Home Owner Information Package that sets out the process for submitting Statutory Warranty Forms for outstanding warranty items. When a claim is filed, it usually triggers a period of 120 days for the builder to address the repairs. If the matter remains unresolved, the homeowner has 30 days to inform Tarion and request conciliation. The builder generally has 30 days from the date of that request to resolve any outstanding problems. If the repairs are still not completed, Tarion conducts the conciliation with the homeowner and the builder present. A report is prepared, outlining the items that the builder must resolve and setting out whatever is not covered.
- 24** Some homeowners encounter problems that cannot be resolved to their satisfaction through the warranty program. In these situations, they can choose to appeal to the Licence Appeal Tribunal, or pursue their legal options through a civil suit. In the 2005-2006 fiscal year, the Licence Appeal Tribunal received 173 with regard to the warranty program.

The Ministry’s Relationship with Tarion

- 25** The Ministry is responsible for oversight of a number of arm’s-length bodies carrying out delegated administrative authority. According to Ministry officials, the *Safety and Consumer Statutes Administration Act* governs other delegated authorities, but does not apply to Tarion. As the Deputy Minister explained to us in response to our notice of intent to investigate:

Tarion is not established by or subject to the *Safety and Consumer Statutes Administration Act*. The *SCSAA* requires DAAs (Delegated Administrative Authorities) to have entered into a binding Administrative Agreement with the Ministry, with a specific governance and accountability framework. The Ministry’s oversight

² Calculated based on revenues reported in the financial statements contained in Tarion’s 2006 Annual Report.

of Tarion is centred on an Accountability Arrangement entered into with the corporation on June 26, 2003.

- 26** The accountability arrangement with Tarion was entered into as a result of the Auditor General's 2003 annual report, which recommended that the Ministry take action to ensure that better accountability mechanisms were in place to protect consumers buying new homes in Ontario. It establishes formal reporting requirements and outlines the roles and responsibilities of each party. It also contains an acknowledgement on the part of Tarion that it is accountable to the Ministry. Under the arrangement, Tarion remains responsible for the day-to-day administration of the new home warranty plan.

Consumer Expectations

- 27** The common theme among the complaints we received from homeowners is that when they contacted the Ministry regarding their concerns, they fully anticipated that it would intervene to assist them in reaching a resolution with Tarion. As one frustrated individual remarked to us:

We bought this house...with the assumption there are government regulations, there's municipal regulations...all the protection is there, and there is the Ontario New Home Warranty program... You buy it and if there is a problem, you feel there should be some protection there, and definitely from the Ministry that sets the rules and hopefully monitors the rules...

- 28** Given the Ministry's general consumer protection mandate, it is not unreasonable for homeowners to assume that they can turn to the Ministry when other avenues of resolution fail. One of them put it this way in a letter to the Minister:

I was under the impression that you, being the head of the Ministry of Government and Consumers Services, are the overseer of Tarion and any and all complaints regarding Tarion.

- 29** It is often only after writing to the Ministry for assistance that homeowners are informed that it does not intervene in individual cases. In a letter to one owner, the Deputy Minister stated:

...the relationship [between the Ministry and Tarion] does not relate to the handling or intervention in individual cases; these are exclusively under Tarion's regulatory jurisdiction.

- 30** We also found cases where another branch of the government had referred homeowners to the Ministry, suggesting that Tarion-related issues fell within its “responsibility.” When they followed that advice, these individuals were understandably frustrated to learn that the Ministry would do nothing about their concerns.
- 31** Mr. Green was one such case. His problems began about three years ago when, within only a few weeks of taking possession of his home, the floor collapsed. He contacted Tarion and within a month an inspection was done which confirmed major deficiencies. Although some repairs were made, problems persisted. Unable to get Tarion and the builder to resolve the outstanding issues, Mr. Green contacted the Ministry of Municipal Affairs and Housing about Building Code violations. He was advised that he should raise his concerns about Tarion with the Ministry of Government and Consumer Services. But when he did so, he was advised that this Ministry would not assist him either – and he was left with the impression that he had been caught in a bureaucratic buck-passing exercise.
- 32** It is not only consumers who are left confused about the scope of the Ministry’s involvement with Tarion; even some Members of Provincial Parliament who have contacted my Office have failed to understand the limitations of the Ministry’s role. This, too, is understandable, since the Ministry does not publicize the extent of its involvement in this area.

Ministry Reality

- 33** While the Ministry declines to intervene in individual cases, it has addressed systemic issues that have been raised through its oversight of Tarion. It has worked with Tarion on a number of initiatives that have resulted in changes to customer service standards, streamlined warranty processes and increased the amount of information that Tarion provides to consumers. The Ministry often tells homeowners who complain: “The Minister reviews all of the concerns that homeowners raise, and uses them as a guide for potential improvements.” After concerns were raised about the adequacy of warranties in 2006, the Minister requested that Tarion undergo a review of the delayed closing and delayed occupancy warranties by an independent third party. Tarion responded by forming a Special Committee on Delayed Closings

chaired by former Supreme Court justice Frank Iacobucci that resulted in a number of recommendations for reform.³

- 34** Adding to consumer confusion is the fact that despite the Ministry's position that it does not get involved in individual complaints, it *has* taken action in some cases. In several of the letters we reviewed, homeowners were advised that while it was "inappropriate" for the Ministry to intervene in individual cases, it had asked its staff to contact Tarion because customer service complaints had been raised. What is not made clear to homeowners is that when the Ministry does contact Tarion on their behalf, it is only in relation to the "customer service" aspect of their complaint. The Ministry will not attempt to mediate substantive complaints about warranty issues.
- 35** This position was confirmed to us by the Assistant Deputy Minister of the Policy and Consumer Protection Services Division, who stated that depending on what the nature of the complaint is, the Ministry may or may not become involved:

If it's a customer-service type of complaint, [Ministry staff] will try and get involved to see if they can sort out what the problem is, but again, if it's dissatisfaction with a decision, we would have to step back.

- 36** Even in such situations, the Ministry's role is generally restricted to informing Tarion of the homeowner's complaint, requesting that Tarion look into the complaint, and then relaying the information provided by Tarion back to the homeowner. Once again, the limitation of the Ministry's role is not always made clear to the consumer.
- 37** So what assistance can new home owners expect to receive from the Ministry? According to the Director of the Sector Liaison Branch:

My staff explain the relationship between Tarion and the Ministry and will often refer the homeowner to Tarion. If [we] think it's an emergency situation, we'll refer them directly to someone like ... the Director of Government Relations who will handle it, but we don't actually mediate consumer complaints. We don't have the authority to do so nor do we have the expertise to do so – these are construction issues.

³ Special Committee on Delayed Closings. *Final Report of the Special Committee on Delayed Closings*. Ontario: Tarion, February 2007.

- 38** Ministry staff were quick to point out, however, that the Ministry still wants to hear from new homeowners regarding potential systemic issues that may affect public policy. The Director of the Sector Liaison Branch told us:

I think that it's important that the government continue to hear from homeowners because homeowners are a very important part of what we do and it is [in] our legislation, and I think that everything that we have done in the past couple of years is as a result of homeowners making their voices heard. So even though we can't necessarily change a warranty decision, every one of those letters is considered when we're making public policy decisions.

- 39** While the Ministry may value hearing from homeowners, few of them are aware of how the Ministry uses the information that they provide. From what they told us, it seems fair to say that most are more interested in resolving their personal warranty problems than in potentially contributing to future policy development. That being said, it is apparent that the Ministry is genuinely concerned about promoting the interests of consumers.

Focus on Consumers

- 40** During this investigation, a common view expressed by senior Ministry staff was that although Tarion has undergone improvements over the years, such as setting up a customer contact centre and enhancing its website, "much still needs to be done in order for Tarion to meet the government's and the public's expectations". This sentiment was echoed in a recent letter from Minister Ted McMeekin (the Minister as of October 30, 2007) to senior staff at Tarion.

- 41** On March 18, 2008, the Minister wrote to the outgoing Chair and CEO of Tarion, stressing the need for improvements to Tarion's governance, transparency and responsiveness to consumers. He emphasized that:

As an organization with a mandate to serve the public interest, it is critical that Tarion continue to improve. The purchase of a home is one of the largest and most important decisions that one can make, and I, like you, want to ensure that consumers are afforded every protection.

- 42** While recognizing that Tarion had undertaken a number of consumer protection initiatives, the Minister emphasized that it was "a time of great public scrutiny of Tarion and its business practices." He referred to the Ministry's receipt of a record

number of complaints about Tarion, and indicated that he would be seeking assurances from the new CEO and Chair that improving homeowner protection remained a priority for the Corporation. The Minister signalled that he would be asking the new Board to carry out a number of measures focused on increasing Tarion's transparency and accountability, including:

- developing clear business and strategic plans
- providing greater detail in Tarion's quarterly reports regarding timeliness of claims service, complaints about staff and the warranty claims process
- providing turnaround times for inspection, repair and closing of warranty files
- developing a conflict-of-interest protocol and code of conduct for claims staff; and
- enhancing public transparency through holding public annual general meetings and open houses, and increasing disclosures in Tarion's annual report.

43 During discussions with two of Tarion's senior counsel, our investigators were advised that the Corporation has evolved substantially over the past few years and intends to bring in an automated system to track complaints – but they suggested that this continues to be an ongoing process. We were left with the impression that Tarion, while taking some steps to adopt more of a consumer focus, is not strongly motivated by a sense of urgency regarding improving its practices. Tarion's mandate affects almost half a million consumers a year. Given the importance of warranty protection to Ontario's homeowners, I urge the Ministry to aggressively continue to take proactive steps to move Tarion towards truly reflecting a culture of public service.

44 Ultimately, however, it is not the Ministry that is responsible for the day-to-day operation of the Corporation. Although it has increased its involvement with selection of Board members, its appointees do not operate under its direction.

The Board of Directors: Public Advocates or Public Misnomer?

- 45** Tarion’s Board of Directors consists of 16 members who are appointed annually and represent a range of stakeholders from Ontario’s new home building industry. In 2007, the Minister of Government and Consumer Services proposed that Tarion change its bylaw to expand the number of ministerial appointees from four to five. The board agreed to this request in March 2007. The five ministerial appointees now include three “consumer representatives,” one municipal representative and one senior Ministry representative.
- 46** While the selection of ministerial appointees is to ensure that a variety of viewpoints are heard and considered on the board, what may not be entirely clear to new home owners is what happens after the appointees are selected. As in most corporations, appointees are, for all intents and purposes, members of the corporation, accountable to *all* stakeholders and not just a specific stakeholder group. While the Ministry keeps track of the attendance of its appointees at board meetings, these members have no reporting obligations to the Ministry.
- 47** When we asked them about their role on the Tarion Board of Directors, the ministerial appointees were generally of the view that their role is no different from that of other board members. One of those designated as a “consumer representative” stated:
- I was just another director...I learned that my responsibility was as a member of the board. In other words, when I approached an issue, I couldn’t just decide as a consumer advocate, I’d have to look at the board, our responsibilities, how we’re supposed to do the work, how we’re supposed to handle information.
- 48** Others noted positive, albeit incremental, changes as a result of the increase in representatives appointed by the Ministry to the Tarion Board of Directors. One indicated that when funds were cut out of the budget for consumer education about Tarion’s processes, the Ministry appointees on the board pushed for the funds to remain. As a result of their efforts, funding was put back in the budget for consumer education. Other Ministry appointees also pointed out that they supported changes to be made in the area of delayed closings.
- 49** Unfortunately, the fact that “consumer representatives” are appointed to the Board without any clear public explanation of their role has led to additional consumer confusion and misdirected complaints. After the June 9, 2007 *Toronto Star* article referring to the Ministry’s newest appointee as a “public

advocate,” several homeowners tried contacting the appointee directly about their concerns, until he requested that Tarion deal with the inquiries directly. One confused homeowner received a response from senior staff at Tarion advising that this board member was not in fact the “consumer advocate,” that such a position “does not exist” and “he does not have a role as an individual complaints department.”

- 50** This straightforward response was no doubt disappointing to the recipient, but it was more information than the Ministry had provided. When we asked for clarification about the consumer representative’s role from the Acting Manager of the Delegated Authority Liaison, we were advised that the board member was “not officially the public advocate.” However, the Ministry was unable to confirm whether the characterization of the appointee’s role that appeared in the *Toronto Star* had originated with government officials, or with the newspaper.

A Web of Confusion

- 51** The Ministry’s website is woefully bereft of information about its role with respect to the Ontario New Home Warranty Plan and Tarion. As one homeowner told us:

Everything to do with Tarion and the way the Ministry is involved is couched in generalities ... nothing is specific.

- 52** One does not have to look very far on the site to arrive at this conclusion. Under Frequently Asked Questions, there is a category called “Consumer Protection” which then leads to “Purchasing a Home.” There it states that homeowners can find information on “protecting your consumer rights on purchases and services for your home,” but nothing is said about the Ministry’s relationship with Tarion or what assistance consumers can expect to receive if they contact the Ministry.
- 53** While the Ministry’s website contains a search engine where general information can be found about Tarion, consumers will be hard pressed to find a clear statement as to the scope of the Ministry’s oversight. Several homeowners also pointed out that the Ministry’s site states that it “mediates written complaints between consumers and businesses” – but nowhere does it make clear that this does *not* apply to complaints about Tarion.
- 54** Early in our investigation, Ministry staff told our investigators that the Ministry was planning to change its website to include a separate section for purchasing a home, including a description of what Tarion is and information explaining the Ministry’s

relationship with Tarion. We were later advised that while some changes had been made to the website last year, no more changes are planned. This is unfortunate.

- 55** One simple way in which the Ministry could manage expectations would be to clearly advise consumers through its website and other communications about what it can and cannot do to help them with their new home warranty concerns. Hundreds of thousands of Ontarians are affected each year by the plan. They are entitled to know upfront what they can expect of their government. Consumers should not have to wait until they are at the end of the line after years of battling with builders and Tarion to learn that what they believed was their last resort is not available to them. By publicizing what it actually does, instead of relying on vague generalities, the Ministry would leave homeowners with more realistic expectations and a better understanding of where they stand. Less time and resources would also be wasted on fruitless requests for assistance and misdirected complaints.

Opinion

- 56** It is my opinion that the Ministry's failure to provide clear and consistent information to the public about the extent of its relationship to Tarion, the scope of its role in resolving consumer concerns and the role of its representatives on Tarion's Board of Directors is, in accordance with s. 21(1)(b) and (d) of the *Ombudsman Act*, unreasonable and wrong.

Recommendation

- 57** In order to remedy the Ministry's failure to provide adequate information to consumers, I recommend that the Ministry of Government and Consumer Services provide additional clarification on its website and in other communications with the public concerning its relationship with the Tarion Warranty Corporation, including providing information about:

- The role of Ministry appointees to the Tarion Board of Directors; and
- The role the Ministry plays in consumer protection in the area of new home warranties, including the limited scope of its involvement in the resolution of individual complaints.

Subsection 21(3)(g) Ombudsman Act

Ministry's Response

- 58** I provided the Ministry with my preliminary report and met with Ministry officials to discuss it. The Deputy Minister later wrote to my Office confirming the Ministry's commitment to implementing my recommendation. In her letter, the Deputy Minister noted:

I want to assure you that I accept and am committed to implementing your valuable recommendations to improve communications by explaining the Ministry's role in handling consumer complaints about new home warranties. I am also committed to clearly explaining the role of ministerial representatives on the Tarion Board of Directors. Based on your final report, the Ministry will be undertaking changes to its website to provide clear, detailed, and consumer-friendly information regarding the ministry's relationship with Tarion, as well as Tarion's services. Ministry staff will work with the Office of the Ombudsman to ensure the website changes effectively communicate new homeowner information and the nature of the Ministry's role with respect to Tarion. Your recommendations will be implemented within 30 days of the release of your final report.

- 59** I am satisfied with the Ministry's undertakings regarding future communication with the public about the services provided by Tarion as well as its relationship to the Corporation, and will monitor its progress in meeting its commitments.



André Marin
Ombudsman of Ontario